

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION III

CA 06-854

FEBRUARY 21, 2007

DUDLEY COBBLE

APPELLANT

APPEAL FROM THE WORKERS'
COMPENSATION COMMISSION
[NO. F403638]

V.

AYERS DRYWALL, INC. and AIG
CLAIMS SERVICES

APPELLEES

AFFIRMED

Appellant Dudley Cobble appeals the denial of wage-loss benefits by the Workers' Compensation Commission in his claim against appellee Ayers Drywall, Inc. The issue we consider is the application of Ark. Code Ann. § 11-9-505(b)(3) (Repl. 2002). The Commission found that appellant had failed to cooperate in an offered program of rehabilitation or job placement assistance, thus barring his entitlement to any wage-loss benefits. Appellant contends that this finding is not supported by substantial evidence because no such program was actually ever offered and because the vocational rehabilitation provider was not credible in her assessment that appellant was uncooperative. Because we hold that the Commission's decision displays a substantial basis for the denial of relief, we affirm.

The facts leading to this appeal are not in material dispute. Appellant is a man in his early thirties who completed high school. He worked most of his adult life in the drywall business. Appellant suffered an admittedly compensable injury on April 7, 2004, when he fell approximately eighteen feet while at work as a drywall installer. He suffered a fracture in his lumbar spine at L-1, for which he underwent surgical repair. He received workers' compensation benefits for this injury through the date he was declared at maximum medical improvement in October 2004. Appellee paid the twenty-five percent permanent partial impairment rating. Appellant underwent a functional capacity evaluation that showed he was capable of working at medium capacity, with some restrictions.

Despite appellant having met with a vocational rehabilitation counselor twice in December 2004 to discuss his employment or rehabilitation options, an Individualized Written Rehabilitation Plan was never drawn up and executed. The counselor stated in her December 2, 2004, report that appellant lived in northwest Arkansas where the unemployment rate was very low, that appellant was young and in good health, that he lived rent-free and had a supportive family unit, that he was outgoing and personable, but that appellant stated he was not a good student when asked about retraining, and that appellant stated his desire to apply for federal disability benefits. She concluded that appellant was not interested in retraining but "somewhat interested in returning to employment." Later in December 2004, after more interaction with appellant, the counselor wrote that appellant stated his intent to return to work but that "his actions indicate reluctance in locating

employment.” The vocational rehabilitation counselor closed the file on February 19, 2005, writing in her report that appellant apparently did not want to return to work, he did not want to discuss job placement or complete a written plan, he preferred to stay home to help his family on their farm and go to flea markets, he was not financially at a disadvantage in his current situation, and she would not be able to assist him without his motivation to return to work.

At the hearing conducted in August 2005, appellant testified that he attempted to return to work for appellee in the early part of 2005, but he could not meet the physical demands. He instead took occasional drywall patching jobs through a friend, earning intermittent income doing less-strenuous work. Appellant contended that he was entitled to wage-loss benefits in excess of his rating, to which appellee was opposed.

At the hearing, the counselor testified that she had been in this position for over thirty years and that employment was always the main goal for her clients. She agreed that she completed the initial assessment, but she believed appellant to be hesitant about entering into the written rehabilitation plan because it was a binding contract of goals. Having reviewed his restrictions, she believed he was capable of medium-level work. The counselor said each time she brought up retraining, appellant would redirect the conversation to job placement because he was a poor student. She said each time she specifically brought up multiple jobs he might try, appellant would redirect the conversation to retraining but refused to commit to job placement planning. She said that until he would commit to a written plan,

there was nothing for her to do, and it was a waste of everyone's time. The counselor concluded her testimony by saying that while appellant might have been interested in employment, he was not interested in vocational rehabilitation.

The administrative law judge (ALJ) denied the claim on the basis that appellee had proven that appellant was not cooperative with the offered plan of rehabilitation or job placement assistance. The ALJ found the rehabilitation counselor credible when she testified that despite meeting with appellant to determine whether he preferred to take the route of retraining or of job placement assistance, appellant would not commit to one option or the other. The ALJ found that appellant did not outright refuse to participate, but rather he demonstrated an unwillingness to work with or cooperate in the offered program. The ALJ explained that this prevented the counselor from developing a more detailed plan for appellant. Appellant appealed, and the Commission affirmed and adopted the administrative decision in a two-to-one vote. This appeal followed.

This court reviews decisions of the Workers' Compensation Commission to determine whether there is substantial evidence to support it. *Rice v. Georgia-Pacific Corp.*, 72 Ark. App. 149, 35 S.W.3d 328 (2000). Substantial evidence is that relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if its findings are supported by substantial evidence. *Geo Specialty*

Chem. v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000). The issue is not whether we might have reached a different decision or whether the evidence would have supported a contrary finding; instead, we affirm if reasonable minds could have reached the conclusion rendered by the Commission. *Sharp County Sheriff's Dep't v. Ozark Acres Improvement Dist.*, 75 Ark. App. 250, 57 S.W.3d 764 (2001). It is the Commission's province to weigh the evidence and determine what is most credible. *Minn. Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001); *Sapp v. Phelps Trucking, Inc.*, 64 Ark. App. 221, 984 S.W.2d 817 (1998). To be entitled to any wage-loss disability benefit in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that she sustained permanent physical impairment as a result of a compensable injury. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 727 (2000); *Smith v. Gerber Prods.*, 54 Ark. App. 57, 922 S.W.2d 365 (1996). Appellant was issued a twenty-five percent permanent impairment rating, which was accepted by the employer.

In making the wage-loss disability determination, the Commission should examine the medical evidence, the worker's age, his education, his work experience, and any other matters that may affect future earning capacity, including motivation and attitude about re-entering the work force. Ark. Code Ann. § 11-9-522(b); *see also Emerson Elec., supra*;

Ellison v. Therma Tru, 71 Ark. App. 410, 30 S.W.3d 769 (2000). The Commission may use its superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *See Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). However, there is a statutory limitation regarding wage loss found in Ark. Code Ann. § 11-9-505(b)(3), which states:

The employee shall not be required to enter any program of vocational rehabilitation against his or her consent; however, *no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.* (Emphasis added.)

Appellant argues that the rehabilitation counselor was biased in favor of the insurance company, that her testimony was inconsistent, and that it was impossible for appellant to refuse to cooperate in job placement assistance that was never actually offered to him. He asserts that the Commission's decision to bar him from wage-loss benefits is not supported by substantial evidence. We disagree.

We focus on the job placement assistance because by all accounts appellant was not interested in vocational rehabilitation retraining. The question boils down to whether there was evidence upon which the Commission could rely that appellant failed to cooperate with job placement assistance. We believe that fair minded persons could conclude that he did refuse to cooperate. We are mindful that this counselor, whose testimony was deemed credible, was convinced that appellant had no real impetus to want to return to full-time gainful employment. She was further convinced that appellant simply did not want to move

forward with job placement assistance. With that, there is a substantial basis for the denial of relief. *Compare Lohman v. SSI, Inc.*, __ Ark. App. __, __ S.W.3d __ (March 15, 2006) (holding no substantial evidence to support that Lohman did not cooperate with assistance in job placement; Lohman made several attempts to cooperate, failing in later months due to undisputed depression and drug dependency issues related to the work injury, left unaddressed by employer).

The Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusion if presented with the same facts. *Fox v. American Transp.*, 54 Ark. App. 115, 924 S.W.2d 814 (1996). After consideration of this appeal under the proper standard of review, we affirm.

Affirmed.

GLOVER and MILLER, JJ., agree.